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LABOUR & E.S.I. DEPARTMENT

NOTIFICATION

The 24th April 2012

No. 3208—IR-(ID)-70/2010-LESI.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the Award, dated the 2nd April 2012 in Industrial Dispute Case No. 44 of 2010 of the Presiding Officer, Industrial Tribunal, Bhubaneswar to whom the industrial dispute between the Management of M/s Ruchika Social Service Organization, Bhubaneswar and its Workman Shri Niranjan Pradhan was referred to for adjudication is hereby published as in the Schedule below :

SCHEDULE

INDUSTRIAL TRIBUNAL, BHUBANESWAR

INDUSTRIAL DISPUTE CASE No. 44 OF 2010

The 2nd April 2012

Present :

Shri Raghbir Dash, O.S.J.S. (Sr. Branch),
Presiding Officer,
Industrial Tribunal,
Bhubaneswar.

Between :

The Secretary, . . . First Party—Management
Ruchika Social Service Organisation,
3731-A, Sriramnagar,
Samantarapur,
Old Town,
Bhubaneswar.

And

Shri Niranjan Pradhan, . . . Second Party—Workman
C/o Smt. Sanjukta Samantaray,
Plot No. 466, Nayapalli,
Bhubaneswar.

Appearances :

For the First Party—Management	..	Shri R. N. Rath, Authorised Representative.
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For the Second Party—Workman himself.	..	Shri Niranjan Pradhan
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AWARD

The Government of Odisha, in the Labour & Employment Department (presently, the Labour and E.S.I. Department) in exercise of powers conferred upon them by sub-section (5) of Section 12, readwith clause (d) of sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 (14 of 1947) for short the Act have referred the following dispute for adjudication vide their Order No. 6404—ID-70/2010-LE., dated the 30th July 2010 :—

“Whether the action of the management of Ruchika Social Service Organisation, Bhubaneswar in terminating the services of Shri Niranjan Pradhan, Supervisor with effect from the 31st July 2009 is legal and/or justified ? If not, what relief he is entitled to ?”

2. In his claim statement, the second party has pleaded that since 3-1-2000, he had been working in Ruchika Social Service Organisation (first party) under the direct supervision of the Programme Manager as well as the Secretary of the Organisation. However, no appointment order was issued in his favour. Initially, he used to get salary of Rs. 900 per month which stood revised from time to time and, lastly, he was getting Rs. 2,500 per month. Thus, he had worked under the first party continuously for a period of about eight and a half years. But without any reason, the first party terminated his services with effect from the 31st July 2009 without complying with the provisions of Section 25-F of the Act. The second party claims that the management being vindictive removed the second party from employment due to the reason that he and other old employees of the Organisation had formed a Trade Union, got it registered and then demanded for better salary structure and other service conditions.

3. The stand taken by the first party in its written statement is narrated in brief. According to the first party, the Organisation is a Charitable Institution running on donations and financial aids received from various Government and Non-Government sources. Because of its non-profit motive as well as philanthropic activities, it cannot be said to be an industry’ as defined under the Act. Many persons having the inclination to serve for the destitutes have joined the Organisation to work for free or for honorarium. The Organisation has engaged some stray servants on hire basis to do some manual and technical work.

As regards the second party, it is claimed that he was engaged either as supervisor or a cluster educator or a cluster resource person on honorarium. There was no employer-employee relationship between the parties. That apart, the second party cannot be said to be a ‘workman’ as defined under the Act. He had been working in the capacity of a supervisor and the dominant nature of his work was supervisory. That apart, the second party had been engaged purely for a particular project which was for a fixed period and after closure of the project , the engagement of the second party automatically came to an end.

4. On the basis of the pleadings of the parties, the following issues have been settled :—

ISSUES

- (i) Whether the action of the management of Ruchika Social Service Organisation, Bhubaneswar in terminating the services of Shri Niranjan Pradhan, Supervisor with effect from 31st July 2009 is legal and/or justified ?
- (ii) If not, what relief he is entitled to ?
- (iii) Whether the first party is an “industry” ?
- (iv) Whether the second party is a “workman” ?

5. The second party has examined himself as W.W.1. He has exhibited documents which are marked Exts.1 to 6. The first party has examined two witnesses. M.W.1 is the Project Manager in the establishment of the Organisation and M.W.2 works as a Cluster Educator in the same establishment. On behalf of the first party, documents have been marked as Exts. A to BB/1.

FINDINGS

6. *Issue No. (iii)* —Claiming that the organisation is not an ‘industry’ the management has adduced evidence to the effect that it is a voluntary organisation. It gets donations from different sources and also gets financial assistance from the State Government as well as the Central Government. Though it imparts education to children it does not collect any fees from their parents. It is a non-profit motive Institution. It does not produce or distribute any materials. The organisation engages some stray servants on hire basis to do some manual and technical work but its main activities are performed by volunteers having the inclination to serve for the destitutes without any remuneration.

It is claimed by the first party that it is a Charitable Institution. But, all Charitable Institutions are not excluded from the definition of the word “industry” as explained by the Hon’ble Supreme Court in Bangalore Water Supply & Sewerage Board *Vrs. A. Rajappa*, AIR 1978 (SC) 548. In the aforesighted case, their Lordships have observed that in any profession, club, educational institution, co-operative, research institute, charitable projects and other kindred adventure where systematic activity organised by co-operation between employer and employee for the production and/or distribution of goods and/or services calculated to satisfy human wants and wishes is undertaken, it comes within the definition of the term “industry”. With regard to Charitable Institution, it is further observed that if they fulfil the aforesighted tests, they cannot be exempted from the definition “industry”. The Hon’ble Supreme Court have further held that the following two categories of Charitable Institutions would fall within the definition of “industry” :—

- (i) Where the enterprise, like any other, yields profits but they are siphoned off for altruistic objects ;

- (ii) Where the institution makes no profit but hires the services of employees as in other like businesses but the goods and services, which are the output, are made available, at low or no cost to the indigent needy who are priced out of the market.

The first party may come within the second category of the Charitable Institutions.

7. The second party relies on a decision of the Hon'ble High Court of Madras, reported in 2010(I) LLJ 101 between Thilagavathi S. & P.O., Labour Court, Madurai and argues that the findings of the Hon'ble Madras High Court are squarely applicable to the case at hand. The Thilagavathi's case, the society by name "Madurai Children Aid Society" was being used as an observation home for children and the Government was providing aid to the Society which also used to receive donations from other sources. The Society was giving educational training to the children for self help jobs and the like. The Society used to get the allocated works carried out as per its rules and regulations and in accordance with the duty hours. Its accounts were being audited every year. With such factual aspects their Lordships held that there were systematic activities in the Society and there were joint efforts by the employer and employee being carried out for human necessities.

Now, it is to be examined as to how the first party organises/arranges its activities as a Charitable Institution. No doubt the activities of the first party is carried out with the object to render material services to the community. From its annual reports marked Exts.K and K/1 (2007-2008 and 2009-2010) it is found that the motto of the Organisation is to advance opportunities to the under privileged children through education and other services. Around 2,900 children were covered under different schemes imparting education to them in as many as 141 centres managed by the first party. Page-7 of the Annual Report 2009-2010 (Ext.K/1) further reflects that the Organisation's staff strength is 311. The Honorarium structure of the staff is also reflected in the same page. It is also found that the Organisation has one M/s S. N. Adalakha & Co., Saheednagar, Bhubaneswar as its auditor. It further reflects that the Organisation runs a shelter home and a short stay home and that particularly in the year 2009-2010, 227 street girls, 436 boys and 142 women received shelter services. It also runs training centres to impart vocational training. Ext.H reflects that the Organisation had undertaken as many as 17 projects in 2007-2008. All these activities are carried out through its staff who are paid monthly, may be in the name of honorarium.

The structure of honorarium of its staff as given in Ext. K/1 suggests that the staff pattern is hierarchical. Oral evidence of M.W. No.2 further establishes that staff members get promotion from one post to the next higher post. While terminating the services of a staff member, the management pays an amount equivalent to two month's honorarium, as it was done in the case of the second party. All these are sufficient to make an inference that the staff working under the first party are not volunteers but employees.

The materials on record show that the Organisation gets donation from private persons, besides financial aid from the Governmental Agency. Though it is claimed that most of the activities of the Organisation are done by persons who do not get salary or wages from the Organisation, it is not

proved that such persons render free service for the Organisation. It is claimed that persons rendering free service for the Organisation get small honoraria but the Annual Reports reveal that the organisation has a good staff strength who get monthly salary /honorarium. With the staff strength as shown in the Annual Reports one cannot accept the first party's plea that it has engaged some stray servants on hire for manual and technical work. The first party claims that the organisation carries out different activities through a number of volunteers who get honoraria from the Organisation. But, in the Annual Reports, there is no mention about engagement of volunteers. Thus, it is found from the materials on record including the facts stated in the Annual Reports that the first party organisation has been undertaking various projects and that its activities under all these projects are executed through its staff whose strength by no stich of imagination can be said to be minimal or nominal.

There is no material, not even in the evidence of M.W. Nos.1 and 2, to show that charitable activities undertaken by the Organisation are performed by man who work not because they are paid wages but because they share the passion for the cause and derive job satisfaction from their contribution. In Bangalore Water Supply & Sewerage Board's case (*supra*) Hon'ble Supreme Court have obsereved that institutions which are called to be philanthropic entities are industries if they involve co-operation between employers and employees to produce and/or supply goods and/or services. In the case at hand, the first party is found to have been undertaking its social service activities with co-operation of its employees who get salary form the management/organisation. Consideraing the materials available on record, I am of the considered view that like Madurai Children Aid Society in Thilagavathi's case (*supra*), the first party organisation can be said to be an 'industry'.

8. The first party has placed reliance on another decision of the Hon'ble Madras High Court, reported in 1996 (III) LLJ (Supp.) 482 in which a single Judge of the Hon'ble High Court have held that the Madurai Children Aid Society is not an 'industry'. In that reported decision, their Lordship had observed, *inter alia*, that the said Society was discharging sovereign functions as an agent of the State Government. The first party in the case at hand has not shown to have beeen discharging sovereign functions. Therefore, this decision of the single Judge is not applicable to the case at hand.

9. *Issue No. (iv)*—The second party claims to be a 'workman' whereas the first party says that the former was a 'volunteer'. There is no material showing that the second party was working as a 'volunteer'. The first party has not brought on record any materials to show the distinction between its employees on one hand and the second party who is claimed to be a volunteer. So, it is to be presumed that he is an employee.

The alternative plea of the first party is that the second party is excluded from the definition of 'workman' because as a Superviso, he used to get monthly honorarium exceeding Rs. 1,600 and was also discharging functions which were mainly of supervisory nature. In this regard, evidence has been adduced by M.W. No.1 as follows :—

"That, Shri Niranjan Pradhan was initialy allowed to work as a Teacher in the Street Education Centre on 3-1-2002. He was supervising the workability/implementation of the Project work undertaken by the Society at different Basties and slums, etc. Apart

from the work of Teacher, Shri Pradhan was also engaged as a Headmaster, Supervisor, Cluster Resource Person, Cluster Educator in different span of time in different Projects undertaken by the Society-mangaement from the Sponsoring Organisation. As a Headmaster, he was controlling some Schools with regard to proper education, monitoring the work of teachers, keeping attendance of the teachers and students, maintaining food register etc,. Further, it is stated that Shri Pradhan had performed the work of Supervisor, Cluster Resource Person. Cluster Educator. He was also maintaining Basti Education Committees Register and other School records. He was sanctioning leave of the teachers working under him. He was also in supervisory charge with regard to mid-day meal distribution to the students of the School. He was being paid honorarium for rendering the work as a Headmaster/Supervisoe/Cluster Resource Person/Cluster Educator. xx xx."

The management has exhibited some documents in which the second party has been shown as a Supervisor. There is also no dispute that sometimes the second party had worked with the designation of a "Supervisor". But, there must be materials to show that the principal nature of work of the second party was nothing but supervisory. M.W. Nos. 1 and 2 have stated in their evidence on affidavit that the second party's work was supervisory in nature. The management has not produced materials to support what the M.Ws. have stated in their affidavit evidence. Whatever they stated about the nature of the second party's work could have been supported by documentary evidence. M.W. No. 2 has stated that as Supervisor, the second party used to sanction leave the teachers besides looking after proper distribution of the mid-day meal and maintaining Busti Education Committee Register. Not a single leave application sanctioned by the second party has been brought on record. It is shown that the second party was authorised to operate some Savings Bank Accounts. But, that does not prove that his work was supervisory in nature.

The second party, on the other hand, has stated that his duty was to collect survey data and children's data from different centres by making personal visits to the centres from time to time. He used to distribute nutritions, learning materials, books and stationeries to different centres. Also he used to attend the Community Awareness Meetings and consolidate reports of different activities of the Organisation and submit half-yearly and annual report to the Secretary as well as the Programme Manager of the Organisation. All these assertions are not subjected to cross-examination. Regarding operation of Bank Account, the second party has stated that he was not operating the Bank Account independently. From the oral evidence of the second party, it can be said that the principal nature of his work was operational as well as clerical but not supervisory.

The management has failed to prove that the duties of the second party involved any sort of supervision over any other staff of the Organisation. Basing on the documents exhibited by the first party, it cannot be said that the predominant nature of duties discharged by the second party was supervisory. It is well settled that designation or nomenclature cannot form the basis to determine whether a workman is a Supervisor or not. It is the performance of duties which is to be seen. The management has failed to discharge its onus to prove that the work performed by the second party

was supervisory in nature. Taking all these into consideration, I am of the considered view that the second party is a “workman”.

10. *Issue No. (i)*—Admittedly, the services of the second party got terminated with effect from the 31st July 2009. Ext.4 is the order of termination. The reason of such termination is stated to be closure of the “Alternative Schools Project”. In the written statement, the management has taken the plea that due to some activities of the second party which ran against the interest of the Organisation, the latter was forced to close down a number of platform Schools and ultimately, the management decided to close some project works, specifically the Alternative School Project, as a result, the Alternative School Project was closed with effect from the 31st July 2009 and with the closure of the Project, the engagement of the second party automatically came to an end. There is no dispute that sometime prior to the disputed retrenchment, the second party and some other staff of the first party had formed a Trade Union and took up activities to secure better service conditions including higher pay. From the pleadings of the parties, it can be perceived that being dissatisfied with such Trade Union activities, the management terminated the services of the second party and some other staff on the plea of closure of Projects.

The management does not claim that the statutory requirements is laid down under Section 25-F of the Act have been complied with. The management claims that the action is covered under Section 2(00) (bb) of the Act. Admittedly, no appointment order containing terms of employment was issued to the second party. Undisputedly, the second party had been working with the Organisation since 2-1-2000. It is not shown by the management that the second party was employed in a particular Project. In the case of S.M. Nilajkar and others *Vrs. Telecom District Manager, Karnataka*, reported in 2003 (97) FLR 608 (S.C.), the Hon’ble Supreme Court have laid down certain criteria which are to be considered to ascertain whether a workman is engaged in a Scheme or Project and whether the termination of service of such a workman would fall within Clause (bb) of Section 2(00) of the Act. The Hon’ble Supreme Court have observed as follows” :—

“The termination of service of a workman engaged in a Scheme or Project may not amount to retrenchment within the meaning of sub-clause (bb) subject to the following conditions being satisfied :—

- (i) that the workman was employed in a project or scheme of temporary duration ;
- (ii) the employment was on contract, and not as a daily-wager simpliciter which provided *inter alia* that the employment shall come to an end on the expiry of the scheme or project ;
- (iii) the employment came to an end simultaneously with the termination of the Scheme or Project and consistently with the terms of the contract ; and
- (iv) the workman ought to have been apprised or made aware of the above said terms by the employer at the commencement of the employment.”

In the case at hand, it is not shown that the second party was employed on a contract with a condition that the employment would come to an end on the expiry of any Scheme or Project. It is also not proved that the second party was made aware of the said terms of employment from the very commencement of his employment. Therefore, this case does not come within Clause (bb) of Section 2 (00) of the Act. Consequently, the termination of service of the second party with effect from the 31st July 2009 is illegal.

11. *Issue No (ii)*—It is alleged by the second party that when some of the workmen including himself formed a Trade Union and made a representation to the management to enhance their salary, the management became vindictive and denied employment to the second party. Ext.2 reflects that on 12-1-2009, some of the workers submitted a representation to the management to raise their salary structure and to provide better service conditions to the employees. A few months thereafter, the second party has been denied employment. Without any other reason the management denied employment to the second party. Therefore, the second party should be reinstated in service with full back wages.

12. In the result, the reference is answered in favour of the second party. The first party is to reinstate the second party and to pay him full back wages from the date of his termination till the date of reinstatement.

Dictated and corrected by me.

RAGHUBIR DASH

2-4-2012

Presiding Officer

Industrial Tribunal

Bhubaneswar

RAGHUBIR DASH

2-4-2012

Presiding Officer

Industrial Tribunal

Bhubaneswar

By order of the Governor

M. R. CHOUDHURY

Under-Secretary to Government